No. 10560

United States
Circuit Court of Appeals
For the Ninth Circuit

E. J. JONES,

Appellant,

vs.

JIM BRUSH, State Treasurer of the State of Arizona; SIDNEY P. OSBORN, Governor of the State of Arizona; DAN E. GARVEY, Secretary of State of the State of Arizona; MARICOPA COUNTY; JOHN A. FOOTE, ED OGLESBY and PHIL ISLEY, constituting the Board of Supervisors of Maricopa County, Arizona,

Appellees.

BRIEF FOR APPELLEES

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Upon Appeal from the District Court of the United States for the District of Arizona

REPUBLIC AND GAZETTE COMMERCIAL PRINTERY, PHOENIX, ARIZONA

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This proceeding is truly extraordinary. It is a companion suit to the case of State of Washington et al. v. Maricopa County et al., now pending in the United States Circuit Court of Appeals for the Ninth Circuit (No. 10493) and, so far as the Record is concerned, constitutes merely another attempt by counsel for appellant to retry in the Federal Courts the issues which heretofore have been heard and determined by the courts of the State of Arizona.

A. FEDERAL COURTS ARE WITHOUT JURISDICTION TO ENTERTAIN A SUIT BROUGHT AGAINST THE STATE BY A CITIZEN OF THE SAME STATE.

At the outset Appellant is met by the bar of the Eleventh Amendment to the Constitution of the United States.

This is a suit against the sovereign State of Arizona. That the State of Arizona was not joined as a titular defendant in the court below is immaterial as the question of whether the suit is in fact one against a sovereign state is to be determined by the essential nature and effect of the proceeding as the same appears from the entire Record.[1]

We will point out that the complaint wholly fails to state a cause of action, but for purposes of discussion only it may be assumed that the complaint charges that the defendants who are officers of the State of Arizona are about to administer trust funds which have come into their custody pursuant to the Enabling Act of the States of New Mexico and Arizona (Act of June 20, 1910, 36 Stat. at L. 557).[2]

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[1]In the Matter of the State of New York, 256 U.S. 490, 65 L. ed. 1057, 1062, 41 S. Ct. 588:

> "As to what is to be deemed a suit against a state, the early suggestion that the inhibition might be confined to those in which the state was a party to the record (Osborn v. Bank of United States, 9 Wheat. 738, 846, 850, 857, 6 L. ed. 204, 229, 231, 232) has long since been abandoned, and it is now established that the question is to be determined not by the mere names of the titular parties, but by the essential nature and effect of the proceeding, as it appears from the entire record."

[2]Sections 1 to 18 of the Enabling Act refer to New Mexico. Sections 19 to 35 of the Enabling Act are reprinted in 1 Arizona Code Annotated 1939, pp. 37-51, and are reprinted in Exhibit B hereof, beginning at page v.

It is alleged that the public officers of the State of Arizona have violated the trust imposed upon them in that

> "* * * it is the duty of said defendants, under the provisions of said Enabling Act, to resist the unlawful depletion of said trust funds by the above mentioned erroneous decisions of the Supreme Court of Arizona, by resorting to the Federal Courts to prevent the threatened unlawful call and redemption of said bonds, and the consequent depletion of the trust fund thereby; * * *" (R 36)

It seems obvious that if the complaint states a cause of action—which we deny—it is a cause of action against the sovereign State of Arizona which can act only by and through its duly authorized public officials.

(a) *The State of Arizona is the trustee of the proceeds of lands granted to the State by the Enabling Act.*

This conclusion necessarily follows from the simple fact that if any trust is created by the Enabling Act, it is the sovereign State of Arizona—and no public officer thereof—which is the trustee. The Enabling Act itself so provides.[3] The Supreme Court of Arizona has so held,[4] and this Court, upon review of the Enabling Act reached the same con-

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[3]"§28. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to said territory, are hereby expressly transferred and confirmed to the said state, shall be *by the said state held in trust* * * *" 36 Stat. at L. 557 (Emphasis is ours.) See Exhibit A, page i.

[4]*Campbell v. Caldwell,* 20 Ariz. 377, 181 Pac. 181, at p. 182:

"The Constitution, §1, art. 10, makes the state a trustee of the lands granted to it by the federal govern-

clusion[5] It is the State of Arizona which is the owner of the lands granted by the United States under the Enabling Act and all of the proceeds thereof, and any judgment rendered in this proceeding against the state officers named as defendants would affect only funds held by the sovereign State of Arizona in trust and would not affect the action or proceeding of any individual officer. The State of Arizona therefore is the real party in interest and stands sued in this proceeding as though it were actually named a party. Under identical circumstances the Supreme Court of the United States in Hagood v. Southern, 117 U.S. 52, 29 L. ed. 805, 6 S. Ct. 608, has held that the suit in substance is one against the sovereign state. There the court had under consideration a suit to compel the officials of the State of South Carolina to provide for the levying of taxes under a statute repealed by the legislature in order to provide funds for the payment of revenue bond scrip issued in lieu of railroad bonds guaranteed by the State of South Carolina. The court said:

> "* * * Though not nominally a party to the record, it is the real and only party in interest, the nominal defendants being the officers and agents of the State, having no personal interest

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ment for the several purposes for which such lands are granted."

Campbell v. Flying V. Cattle Co., 25 Ariz. 577, 220 Pac. 417, at p. 418:

"The lands owned or held in trust by the state were granted by the federal government under the provisions of the Enabling Act, and the state holds them the same as any other patentee."

[5]*Kelly v. Allen* (C.C.A. 9th, Cir. 1931) 49 F. 2d 876, at p. 878:

"The state is not holding this land as an instrumentality of the United States, but in its own right, in trust, however, for the schools of the state * * *."

in the subject matter of the suit, and defending only as representing the State.

* * * * *

"The State is not only the real party to the controversy, but the real party against which relief is sought by the suit; and the suit is, therefore, substantially within the prohibition of the Eleventh Amendment to the Constitution of the United States, which declares that 'The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.' " (29 L. ed. at p. 810)

The situation here is not dissimilar to that which arose in Louisiana v. Jumel, 107 U.S. 711, 2 S. Ct. 128, 27 L. ed. 448, which was a suit against the Auditor and Treasurer of the State of Louisiana, and others, to recover upon coupons of bonds which had been invalidated by the adoption of a Constitution of Louisiana subsequent to the execution and delivery of the bonds.

Prior to the invalidation of the bonds, moneys had been collected and deposited in the treasury of the state to meet the payment of coupons and it was sought to require the public officers of Louisiana to apply these moneys to the payment of these coupons. The Supreme Court of the United States held that the action was one against Louisiana and could not be maintained, and in so holding (27 L. ed. 452) said:

"The Treasurer of State is the keeper of the Treasury, and in that way is the keeper of the money collected from this tax, just as he is the keeper of other public moneys. The taxes were collected by the tax collectors and paid over to the state Treasurer, that is to say, into the state

Treasury, just as other taxes were when collected. The Treasurer is no more a trustee of these moneys than he is of all other public moneys. He holds them, but only as the agent of the State. If there is any trust, the State is the trustee, and unless the State can be sued the trustee cannot be enjoined. The officers owe duty to the State alone, and have no contract relations with the bondholders. They can only act as the State directs them to act, and hold as the State allows them to hold. It was never agreed that their relations with the bondholders should be any other than as officers of the State, or that they should have any control over this fund except to keep it like other funds in the Treasury and pay it out according to law. They can be moved through the State, but not the State through them."

In *Worcester County Trust Co. v. Riley,* 302 U.S. 292, 82 L. ed. 268, 58 S. Ct. 185, the Supreme Court said:

"* * * Since the proposed action is the performance of a duty imposed by the statute of the state upon state officials through whom alone the state can act, restraint of their action, which the bill of complaint prays, is restraint of state action, and the suit is in substance one against the state which the Eleventh Amendment forbids." (82 L. Ed. at p. 275)

(b) *The jurisdiction of the Federal Courts does not extend to a suit against a state by one of its own citizens even though the case arises under the Constitution and laws of the United States.*

Principality of Monaco v. State of Mississippi, 292 U.S. 313, 78 L. ed. 1282, 54 S. Ct. 745, seems determinative of the question. There the Supreme

Court of the United States reviewed *in extenso* the jurisdiction of federal courts generally to entertain a suit against a state, including a suit against a state by one of its citizens, and lays down this authentic doctrine:

> "Similarly, neither the literal sweep of the words of Clause one of §2 of Article 3, nor the absence of restriction in the letter of the Eleventh Amendment, permits the conclusion that in all controversies of the sort described in Clause one, and omitted from the words of the Eleventh Amendment, a State may be sued without her consent. Thus Clause one specifically provides that the judicial Power shall extend 'to *all* Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.' But, *although a case may arise under the Constitution and laws of the United States,* the judicial power does not extend to it if the suit is sought to be prosecuted against a State, without her consent, *by one of her own citizens, Hans v. Louisiana,* 134 U.S. 1, 33 L. ed. 842, 10 S. Ct. 504; *Duhne v. New Jersey,* supra (251 U.S. p. 311), 64 L. ed. 280, 40 S. Ct. 154). The requirement of consent is necessarily implied. [78 L. ed. 1285]
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> * * * * *
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> "The question of that immunity, in the light of the provisions of Clause one of §2 of Article 3 of the Constitution, is thus presented in several distinct classes of cases, that is, in those brought against a State (a) by another State of the Union; (b) by the United States; (c) by the citizens of another State or by the citizens or subjects of a foreign State; (d) *by citizens of the same State* or by federal corporations; and (e) by foreign States. Each of these classes has its characteristic aspect, from the stand-

point of the effect, upon sovereign immunity from suits, which has been produced by the constitutional scheme. [78 L. ed. 1288-9]

* * * * *

"Protected by the same fundamental principle, the States, in the absence of consent, are *immune* from suits brought against them *by their own citizens* or by federal corporations, although such suits are not within the explicit prohibitions of the Eleventh Amendment. *Hans v. Louisiana,* 134 U.S. 1, 33 L. ed. 842, 10 S. Ct. 504, supra; *Smith v. Reeves,* 178 U.S. 436, 44 L. ed. 1140, 20 S. Ct. 919, supra; *Duhne v. New Jersey,* 251 U.S. 311, 64 L. ed. 280, 40 S. Ct. 154, supra; *Re New York,* 256 U.S. 490, 65 L. ed. 1057, 41 S. Ct. 588, supra." [78 L. ed. 1289] (Emphasis ours.)

Duhne v. New Jersey, 251 U.S. 311, 64 L. ed. 280, 40 S. Ct. 154;

Smith v. Reeves, 178 U.S. 436, 44 L. ed. 1140, 20 S. Ct. 919;

Hans v. Louisiana, 134 U.S. 1, 33 L. ed. 842, 10 S. Ct. 504;

Re New York, 256 U.S. 490, 65 L. ed. 1057, 41 S. Ct. 588.

Hans v. Louisiana, supra, (the first case upon the question) was an action brought by a citizen of the State of Louisiana against that state in the federal court to recover upon coupons annexed to bonds issued by Louisiana, and subsequently invalidated by a provision of the Constitution of Louisiana. Hans asserted this provision was unconstitutional and void as contravening the contract clause of the Constitution of the United States. The Supreme Court of the United States affirmed the judgment of the lower federal court dismissing the action for

want of jurisdiction because the suit was one against the state by a citizen thereof.

Accordingly we submit that the judgment in this action against the officers of the State of Arizona would ultimately reach and affect the State of Arizona itself, even though it may not be named as a party defendant. If it were conceded that a depletion of the trust funds in the control of the State Treasurer by any act of the State Treasurer, the Governor and the Secretary of State, acting either as loan commissioners of the State of Arizona or as officers charged with the investment of the trust funds, it must necessarily affect property owned by the State of Arizona and not by any one sued as a defendant in the court below. What the public officials of the State of Arizona propose to do and of which the Appellant herein complains strikes at the State of Arizona and no one else. The State of Arizona is therefore the real party in interest and stands sued as though it were actually named as a party defendant. The members of the Board of Supervisors of Maricopa County are not proper or necessary parties. They have no authority whatever in connection with the administration of the trust funds, either under the provisions of the Enabling Act or under the provisions of the Constitution of Arizona accepting and consenting to these provisions of the Enabling Act.[6]

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[6]Arizona Constitution, Article 10, §§1 and 2:

> §1. [School lands held in trust.] All lands expressly transferred and confirmed to the state by the provisions of the Enabling Act approved June 20, 1910, including all lands granted to the state and all lands heretofore granted to the territory of Arizona, and all lands otherwise acquired by the state, shall be by the state accepted and held in trust to be disposed of in whole or in part, only in manner as in the said Enabling Act and in

The duty is imposed upon the State Treasurer to keep all funds invested in safe interest-bearing securities which shall be approved by the Governor and the Secretary of State.[7]

These same duties were imposed upon the same state officials by the Enabling Act, but neither the Constitution nor the Enabling Act confers any authority whatever upon boards of supervisors of the several counties of the State of Arizona with respect to the administration of these funds. Cer-

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this constitution provided, and for the several objects specified in the respective granting and confirmatory provisions. The natural products and money proceeds of any of said land shall be subject to the same trusts as the lands producing the same. (See Exhibit A, page i.)

§2. [Lands to be used for objects designated.] Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than that for which such particular lands (or the lands from which such money or thing of value shall have been derived) were granted or confirmed, or in any manner contrary to the provisions of the said Enabling Act, shall be deemed a breach of trust." (See Exhibit A, page i.)

[7]Arizona Constitution, Article 10, §7:

§7. [School funds.] A separate fund shall be established for each of the several objects for which the said grants are made and confirmed by the said Enabling Act to the state, and whenever any moneys shall be in any manner derived from any of said lands, the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such moneys was, by said Enabling Act, conveyed or confirmed. No moneys shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed. The state treasurer shall keep all such moneys invested in safe, interest-bearing securities, which securities shall be approved by the governor and secretary of state, and shall at all times be under a good and sufficient bond or bonds conditioned for the faithful performance of his duties in regard thereto." (See Exhibit A, page iii.)

tainly neither one conferred authority upon the particular Board of Supervisors of Maricopa County. If by any stretch of the imagination the members of the Board of Supervisors of Maricopa County are either proper or necessary parties to this proceeding, it could be so only because they are ex-officio officers and agents of the State of Arizona, justifying its claimed immunity from suit.

B. THE ENABLING ACT OF ARIZONA DOES NOT AND CANNOT CONFER JURISDICTION UPON THE FEDERAL COURTS TO ENTERTAIN THIS ACTION.

Having seen that a citizen may not, without the consent of the state, sue the state of which he is a citizen, in a federal court sitting in that state, perforce the decisions of the Supreme Court of the United States beginning with *Hans v. Louisiana,* 134 U.S. 1, 10 Sup. Ct. 504, 33 L. Ed. 842, down to *Principality of Monaco v. State of Mississippi,* 292 U.S. 313, 54 S. Ct. 745, 78 L. ed. 1282, we next proceed to ascertain whether jurisdiction is conferred, or can be conferred, by the Enabling Act, as asserted by the Appellant in this action.

(a) *No jurisdiction is conferred by the Enabling Act upon the federal courts to entertain suits against the state by its own citizens.*

Section 31 of the Enabling Act expressly confers jurisdiction upon the United States District Court for the District of Arizona similarly as that jurisdiction is conferred upon district courts sitting in the several states of the United States, by providing:

> "The circuit and district courts for said district, and the judges thereof, respectively, shall possess the same powers and jurisdiction and

perform the same duties required to be performed by the other circuit and district courts and judges of the United States, and shall be governed by the same laws and regulations."

Thus, the source of the jurisdiction of the United States District Court for the District of Arizona is no broader or less restricted than the jurisdiction of other district courts. The supreme authority, therefore, for testing the jurisdiction of the United States District Court for the District of Arizona is found in the Constitution of the United States as construed by the Supreme Court of the United States in the several authorities which we have heretofore cited.

Recalling, therefore, that the Supreme Court of the United States had decided that in no instance may a citizen sue his state in a federal court, the last paragraph of Section 28 of the Enabling Act cannot be construed, either by adoption of the state law or otherwise, as conferring jurisdiction on the federal courts to entertain this action. That paragraph provides:

"Nothing herein contained shall be taken as in limitation of the power of the state or of any citizen thereof to enforce the provisions of this act." (Exhibit B, page xix.)

This provision of the Enabling Act does not *expressly* confer jurisdiction upon the federal court to entertain this action, and could not in view of the decisions of the Supreme Court of the United States to the contrary, so it must be assumed that Congress in enacting this provision was cognizant of the decisions of the Supreme Court of the United States prohibiting the exercise of such jurisdiction.

The last sentence of the next to the last paragraph of Section 28 of the Enabling Act provides:

> "It shall be the duty of the attorney-general of the United States to prosecute, in the name of the United States and in its courts, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom." (Exhibit B, page xix.)

This section does not attempt to confer jurisdiction upon the Federal Courts of a suit by the United States to enforce the provisions of Section 28 of the Enabling Act affecting the disposition of funds derived by the state from the grant of lands by the national government under the Enabling Act. This jurisdiction, as indicated by the Supreme Court of the United States in *Principality of Monaco v. Mississippi,* supra, exists independently of the consent of the state. It is there said at p. 1289 of 78 L. Ed.:

> "Upon a similar basis rests the jurisdiction of this Court of a suit by the United States against a State, albeit without the consent of the latter. While that jurisdiction is not conferred by the Constitution in express words, it is inherent in the constitutional plan. *United States v. North Carolina,* 136 U.S. 211, 34 L. ed. 336, 10 S. Ct. 920; *United States v. Texas,* 143 U.S. 621, 644, 645, 36 L. ed. 285, 292, 293, 12 S. Ct. 488; 162 U.S. 1, 90, 40 L. ed. 867, 902, 16 S. Ct. 725; *United States v. Michigan,* 190 U.S. 379, 396, 47 L. ed. 1103, 1109, 25 S. Ct. 742; *Oklahoma v. Texas,* 258 U.S. 574, 581, 66 L. ed. 771, 774, 42 S. Ct. 406; *United States v. Minnesota,* 270 U.S. 181, 195, 70 L. ed. 539, 544, 46 S. Ct. 298. Without such a provision, as this Court said in *United States v. Texas,* 143 U.S. 621, 36 L. ed.

285, 12 S. Ct. 488, supra, 'the permanence of the Union might be endangered.' "

So, we must construe the last paragraph of Section 28 of the Enabling Act in the light of its permissible application, and, when so construed, it can only mean that a *citizen* of the State of Arizona may enforce the provisions of that act, if at all, in the courts of the State of Arizona.

The Supreme Court of Arizona in *Boyce v. County of Pima, et al.,* 24 Ariz. 259, 208 Pac. 419, construed Section 25 of the Enabling Act with respect to the duties of the State Auditor and the State Treasurer to apply the proceeds realized by the State of Arizona from that section of the Enabling Act to the retirement of bonds issued by Maricopa, Pima, Coconino and Yavapai Counties. The state officials contended that the authority to enforce that section of the Enabling Act devolved upon the Attorney General of the United States, in the United States Court, and that no action could be maintained in the courts of the State of Arizona to compel the state officials to comply with that section of the Enabling Act. The Legislature had enacted a Land Code comprehensibly treating with lands acquired by the state under the Enabling Act (Chap. 5, Laws of Arizona, 2nd Spec. Sess., 1915) which the Supreme Court construed as authorizing the counties affected to maintain the suit against the State Auditor and State Treasurer to require them to apply the funds in question to the retirement of the bonds issued by them. Upon this question the Supreme Court of Arizona (208 Pac. 421) said:

"This suggests some of the contentions of the appellants. The proposition is advanced that because the Congress, in the act granting certain

institutional lands to the state, reserved the right to institute suits, through the Attorney General of the United States, in the United States courts, to enforce the provisions of the trust, no action or proceeding can be maintained in the state courts to compel the state's agents to do and perform the things the state Legislature has provided they shall do in the execution of said trust. The mere statement of the contention condemns it. The duty sought to be enforced against the state treasurer and the state auditor is one imposed by a state law. Surely our courts have jurisdiction of questions concerning the duty and power of our state officers as conferred upon them by state legislation.

"Besides there is nothing in the language of the act of Congress (section 28, Enabling Act of June 20, 1910), conferring exclusive jurisdiction, to enforce the trust, or to prevent its breach, upon the United States courts, and, that being so, the *state courts have concurrent jurisdiction* of any actions or proceedings arising out of the administration of the trust. Indeed the very last sentence of section 28, supra, quite clearly conveys the idea that the federal courts shall not have exclusive jurisdiction of actions or proceedings to enforce the trust therein created. The state itself may bring such action, or any citizen may do so, *and have the question decided by the courts of the state.*" (Italics supplied)

Thus, the authority of the United States, and of the State of Arizona, and a citizen thereof, are correlative, with the limitation, however, that the authority of the United States is exercised in the United States Court having jurisdiction of the action, and that of the State of Arizona, and citizens thereof, in the courts of the State of Arizona when authorized by law. No other conclusion is deducible,

since as is respectfully submitted, the Federal Court is without jurisdiction to entertain this action against the State of Arizona without its consent by this appellant who is a citizen of the State of Arizona. The jurisdictional failure in the United States District Court is sufficient to dispose of the case in this Circuit Court of Appeals.

(b) *The Enabling Act cannot be construed to confer jurisdiction in a suit brought by a citizen who has no greater interest in the trust fund than any other member of the general public.*

The policy of Congress, as disclosed in the Enabling Act, was to vest in the Attorney General of the United States the power and duty to enforce the trusts created by the Enabling Act.

Ervien, Commissioner of Public Lands of the State of New Mexico v. United States, 251 U.S. 41, 64 L. ed. 128, 40 S. Ct. 75.

The reservation of the rights of citizens of the state to enforce the provisions of the Enabling Act falls far short of the adoption of any state law by Congress for the purpose of vesting jurisdiction in the Federal Courts to entertain a suit by anyone willy-nilly to enforce the terms of the trust. On the contrary, general principles of law would preclude this suit in the Federal Court as a mere citizen—suing as a member of the general community—has no standing in any court of the United States to maintain the suit. This was the square holding of the Circuit Court of Appeals for the Eighth Circuit in *Downer v. Graham,* 21 F. 2d 732, wherein the court considered that portion of the Enabling Act applicable to New Mexico, which is identical with Section 28 of the Act applicable to the State of

Arizona. In that case suit was brought in the Federal District Court by a citizen of New Mexico to enjoin state officials from alleged violation of the conditions imposed upon the lands granted to New Mexico by the Enabling Act. The court stated:

> "All the above propositions, we take it, are abundantly supported by authority controlling here and by the provisions of the act. Section 10 of the Enabling Act, among other things, provides as follows:
>
> " 'It shall be the duty of the Attorney General of the United States to prosecute in the name of the United States and its courts such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.'
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> "In *Mills County v. Railroad Companies,* 107 U.S. 557, 2 S. Ct. 654, 27 L. Ed. 578, that great lawyer, Mr. Justice Bradley, in speaking of a grant of swamp and overflowed lands to the state of Iowa, under conditions similar to those held by the state of New Mexico in this case, said:
>
> " 'Upon further consideration of the whole subject, we are convinced that the suggestion then made, that the application of the proceeds of these lands to the purposes of the grant rests upon the good faith of the state, and that the state may exercise its discretion as to the disposal of them, is the only correct view. It is a matter between two sovereign powers, and one which private parties cannot bring into discussion.'

"Again, Mr. Justice Field, in the California case of *Hagar v. Reclamation District No. 108,* 111 U.S. 701, 4 S. Ct. 663, 28 L. Ed. 569, said:

" 'The contention of counsel is that the state is bound to carry out this condition, and apply the proceeds to the reclamation, or provide for their application to that end, and that its legislation imposing an assessment upon other lands to raise the necessary funds for that purpose, is in violation of this contract, and therefore void. The answer to this position is twofold. In the first place, if a contract was created by the Arkansas act [9 Stat. 519], when the state accepted its benefits, it is for the United States to complain of the breach if there be any. The plaintiff is not a party to the contract, and is in no position to invoke its protection. But, in the second place, the appropriation of the proceeds rests solely in the good faith of the state. Its discretion in disposing of them is not controlled by that condition, as neither a contract nor a trust following the lands was thereby created. This was distinctly held after elaborate consideration in the recent case of *Mills County v. Railroad Companies,* 107 U.S. 557, 566 [2 S. Ct. 654, 27 L. Ed. 578].'

"From the above cases the conclusion is reached a private citizen cannot call in question the action of the state through its officials in dealing with the proceeds of property granted to the state by the general government under the grant in question; but, on the contrary the grant having been made by the general government in its sovereign capacity to the state, in the exercise of its sovereign capacity, the matter rests solely and alone in the good faith of the state, in so far as its citizens are concerned, and *therefore the complainant in the bill has no capacity as a private citizen or taxpayer of the state to bring or maintain this suit* to control

the action of the state officials in dealing with the fund in question." [Emphasis ours.] (21 F. (2d) at pp. 732-733)

The same ruling was made, in effect, by the Supreme Court of New Mexico in *Asplund v. Hannett,* 31 N.M. 641, 249 Pac. 1074, 58 A.L.R. 573, wherein the Supreme Court of New Mexico denied the right of a citizen of the state to sue in the state courts. Referring to the provision of the Enabling Act applicable to the State of New Mexico, the court stated:

"* * * But in the same section it is provided that nothing therein shall be taken as a limitation of the power of the state, or of any citizen thereof, to enforce the provisions of the act. Some question is raised as to the meaning of these provisions, but we think it plain. *So far as it established any power, or imposed any duty to enforce the provisions of the act, such power and duty were conferred and imposed upon the Attorney General of the United States. Congress conferred no power, and imposed no duty upon the state or citizen.* It simply recognized and consented to the power of the state to control its agencies, and recognized and consented to whatever rights a citizen of the state might have in the premises, *under state laws.*

* * * * *

"* * * Hence, neither in the Enabling Act nor in the Constitution do we locate the power of a citizen and taxpayer to sue for the enforcement of the trust provisions." (249 Pac. at pp. 1075-1076). [Emphasis ours].

Appellant has recognized that the Enabling Act "did not grant to citizens of the state the right to enforce the restrictions upon the expenditure of state land grant funds." (Brief of Appellant p. 5). In truth and in fact it is clear that the Enabling Act

never contemplated a suit in the Federal Courts by one whose interests were no greater than any other member of the general public. The settled rule in the Federal Courts is that an individual, as such, has no sufficient interest or standing to justify the exercise of federal jurisdiction.

Massachusetts v. Mellon (1922), 262 U.S. 447, 67 L. ed. 1078, 43 S. Ct. 597:

"* * * His interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation of any payment out of the funds so remote, fluctuating, and uncertain that no basis is afforded for an appeal to the preventive powers of a court of equity.

* * * * *

"* * * If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect to the statute here under review, but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained." (67 L. ed. p. 1085).

(c) *No question of the construction of the Enabling Act is here involved.*

Appellant seeks to invoke the jurisdiction of this Court on the ground that this is a case arising under the Constitution and laws of the United States,—particularly under the provisions of the Act of Congress of June 20, 1910 (36 Stat. at L. 557) commonly

known as the Enabling Act of the States of New Mexico and Arizona.[8]

By virtue of the provisions of Sections 24 to 28 of that Act, certain lands were granted to the State of Arizona in trust, their proceeds to be used for certain specified purposes, educational and otherwise. The State is constituted trustee of this trust and under Section 28 of the Act the State Treasurer is required to invest the proceeds of the sale of lands in "safe, interest-bearing securities." It is also provided in the Enabling Act that separate funds are to be created for each of the objects specified therein and that no funds are to be used for other than the specified purpose. Where in the complaint in the court below is it alleged that the investment by the State of Arizona in Maricopa County Highway Bonds constitutes a breach of trust? In fact it appears by the complaint itself that the funds were invested in interest-bearing securities as required by Section 28 of the Enabling Act and the safety of these securities is not in question. Furthermore, it is nowhere alleged by the Appellant that any acts formerly done, or that are proposed to be done by the State of Arizona, including the redemption of the outstanding Maricopa County Highway Bonds, constitute a breach of the terms of the trust as set forth in the Enabling Act of Congress creating the trust. The alleged breach—and the only alleged breach of trust—is the asserted claim that:

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[8]Paragraph III of the complaint recites (R 3-4):

> "That jurisdiction of the United States District Court for the District of Arizona is invoked in this suit upon the ground that this is a case arising under the Constitution and laws of the United States and particularly under the Act of Congress approved June 20, 1910, commonly known as the Enabling Act of the States of New Mexico and Arizona."

> "* * * it is the duty of said defendants, under the provisions of said Enabling Act, to resist the unlawful depletion of said trust funds by the above mentioned erroneous decisions of the Supreme Court of Arizona, by resorting to the Federal Courts to prevent the threatened unlawful call and redemption of said bonds, and the consequent depletion of the trust fund thereby; * * *" (R 36).

Upon this flimsy foundation, plaintiff in the court below and now as Appellant herein seeks to relitigate and retry two decisions of the highest court of the State of Arizona and a decision of the Superior Court of Maricopa County.[9]

Thus Appellant seeks in one breath to maintain the jurisdiction of the Federal Courts on the ground that the outcome of the controversy is dependent upon the construction of an Act of Congress and then merely alleges that under his construction of the Constitution and statutes of the State of Arizona (which is admittedly contrary to the conclusions of all of the courts of that State) bonds held by the State of Arizona under the trust set up by an Act of Congress are not callable prior to their maturity date and refundable by the issuance of

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[9] *Maricopa County v. Osborn* (decided May 4, 1942; rehearing denied Sept. 16, 1942), 59 Ariz. 244, 125 P. 2d 703 (herein called the "First Maricopa Case").

Maricopa County v. Osborn (decided April 12, 1943), ——— Ariz. ——, 136 P. 2d 270 (herein called the "Second Maricopa Case").

J. L. Gust v. Boettcher and Company, et al,—decision of the Superior Court of Maricopa County granting summary judgment on June 21, 1943, in favor of defendant (herein called the "Taxpayer's Suit"). A transcript of the record of this suit is printed separately as Brief of Appellees Appendix No. 1, in State of Washington, et al., vs. Maricopa County, et al., No. 10493, now pending in this court.

State of Arizona refunding bonds. In short, the whole argument of Appellant is directed to the question of the construction of laws of the State of Arizona and by Appellant's very argument, if the bonds of Maricopa County are subject to call and redemption under the laws of the State of Arizona, there can be no breach of the alleged trust. Such has been the uniform holding of the courts in Arizona. This in itself is sufficient to show that no question of the meaning of the Act of Congress is here involved. The very cases upon which Appellant relies to establish jurisdiction prove the contrary.

In *King County v. Seattle School District,* 263 U.S. 361, 68 L. ed. 339, 44 S. Ct. 127, there was directly involved the question whether an Act of Congress permitted money received by the county to be expended by the county commissioners as directed by the State Legislature, or required an equal distribution annually for the benefit of public schools and public roads of the county. The Act of Congress, as construed by the Supreme Court

> "does not direct any division of the money between schools and roads." (68 L. ed. p. 341).

The case is therefore of importance only for the one point which was decided.

> "* * * No trust for the benefit of appellee is created by the grant. But, assuming the moneys paid over to the State are charged with a trust that there shall be expended annually one-half for schools and one-half for roads, the appellee has no right to enforce the trust. Congress alone can inquire into the manner of its execution by the State." (68 L. ed. p. 341).

The true rule is expressed in *First National Bank of Canton v. Williams,* 252 U.S. 504, 64 L. ed. 690, 40

S. Ct. 372, wherein the court stated (40 S. Ct. at page 374):

> "* * * If the plaintiff thus asserts a right which will be sustained by one construction of the law, or defeated by another, the case is one arising under that law."

Similarly, as this Court stated in *Marshall v. Desert Properties Co.,* (9th C.C.A.) 103 F. 2d 551, the case does not arise under the Constitution and laws of the United States unless it involves a dispute as to the validity, construction or effect of such law.

> See, also *Smith v. Kansas City,* 255 U.S. 180, 65 L. ed. 577, p. 585, 41 S. Ct. 243.

It is not sufficient that the Appellant claims that the trust fund created by an Act of Congress may suffer loss because the proceeds of a sale of the trust lands were invested in bonds now callable for redemption under the laws of the State of Arizona, but the suit in order to vest jurisdiction in the Federal Courts must really and substantially involve a dispute or controversy affecting the validity, construction or effect of the Enabling Act upon the determination of which the result of the suit will depend. The meaning or construction of the Act of Congress of June 20, 1910 establishing the trust is in no manner called into question. Neither its validity, construction nor effect is in anywise involved. It is only by virtue of the fact that the ultimate source of the funds from which the outstanding bonds of Maricopa County were purchased was property granted by the United States to the State of Arizona in trust that Appellant seeks to invoke the jurisdiction of this Court to ask it to grant a rehearing of the final decisions of the Supreme Court of Arizona and of

the Superior Court of Maricopa County in a matter which involves solely the construction of state law. It is clear that this controversy may be finally determined without reference to the meaning of any Act of Congress. Therefore no federal question is raised under the Enabling Act.

The allegation that a breach of trust created under the Enabling Act exists because the state officers failed to institute suit in the Federal Court is wholly without merit. [R. 35-36].

No provision of the Enabling Act requires these public officers to institute any suit in the Federal Court or vests jurisdiction in the Federal Court of any suit which might be instituted by them.

Conceding the rule that a trustee is obligated to protect his trust estate, it is obvious from the Record that the State Treasurer and the public officials of the State of Arizona were over-zealous in the defense of their position. The reported decisions show that the State Treasurer appeared in both the First Maricopa Case and the Second Maricopa Case by the Attorney General of the State of Arizona and contested the right of Maricopa County to accelerate the maturity of its outstanding bonds. Learned *amici curiae* added their support to the position taken by the State Treasurer (R. 91, R. 98-116). In addition Mr. J. L. Gust, attorney herein for Appellant, filed suit as a taxpayer in the Superior Court of Maricopa County wherein a judgment (which is now *res judicata*) was rendered against the contentions herein asserted.[10]

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[10] *J. L. Gust v. Boettcher and Company, et al,* (herein called the "Taxpayer's Suit"). The complete record is set forth as Appendix No. 1 to the Brief for Appellees in *State of Washington, et al, v. Maricopa, et al* (C.C.A. 9th Cir. No. 10493).

We repeat that no provision of the Enabling Act requires the State Treasurer or any state officer to institute any suit in the Federal Court, and it is clearly the rule that a trustee cannot be held guilty of breach of trust upon the mere ground that after asserting his rights in the state courts unsuccessfully he fails to relitigate the same issues in the Federal Court. The state courts are equally competent to decide federal questions as well as those relating solely to local law.[11] Such was in fact the holding of the Supreme Court of Arizona in *Boyce v. Pima County,* 24 Ariz. 259, 208 Pac. 419, wherein the Arizona Court held:

> "Besides there is nothing in the language of the Act of Congress (section 28, Enabling Act June 20, 1910), conferring exclusive jurisdiction, to enforce the trust, or to prevent its breach, upon the United States courts, and, that being so, the state courts have concurrent jurisdiction of any actions or proceedings arising out of the administration of the trust. Indeed the very last sentence of section 28, supra, quite clearly conveys the idea that the federal courts shall not have exclusive jurisdiction of actions or proceedings to enforce the trust therein created. The state itself may bring such action, or any citizen may do so, and have the question decided *by the courts of the state.*" [Emphasis ours]. (208 Pac. at p. 422).

Furthermore, as the only question here involved is a question of state law, and it appears on the Record that the Federal Court is wholly without jurisdiction, it seems obvious that the State Treasur-

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[11] *Blythe v. Hinckley,* 180 U.S. 333, 45 L. ed. 557, 21 S. Ct. 390, page 392;
Grubb v. Public Utilities Commissioner, 281 U.S. 470, 74 L. ed. 972, 50 S. Ct. 374.

er (even if considered a trustee) is no more obligated to institute frivolous and unsubstantial lawsuits than he is to interpose sham and frivolous defenses in any action brought against him.[12]

As we have pointed out, the only obligation imposed on the State of Arizona under the Enabling Act is that the proceeds of the sale of lands conveyed to the State of Arizona shall be invested in "safe, interest-bearing securities." Nothing in the Enabling Act limits or restricts the amount of the investment or the purchase price to be paid for the investment, or limits or restricts the right of the state officers to invest moneys in safe, interest-bearing securities which may be subject to call and redemption at the option of the issuer prior to their fixed maturity date. A bond subject to redemption prior to its fixed maturity date is nevertheless an interest-bearing security as the optional redemption feature affects only the "yield" or the effective return on the investment. No loss will result from the call and redemption of the bonds as it is necessary only that the purchase price paid for the bonds be amortized over their life.[13] It is obvious that the rate of return on all investments now held in the fund created by the Enabling Act will be affected by market

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[12]*Barnes v. Lyles,* 110 S. C. 465, 96 S. E. 723, page 724:

> "* * * An attorney or trustee is under no duty to interpose an unmeritorious or frivolous defense for his clients or *cestui que* trusts."

[13]Municipal securities are sold and traded in on a "yield" basis. The net return on the purchase price paid to maturity, and not the mere coupon rate of the bonds, is the correct "yield." See *Montgomery, Financial Handbook,* pages 115 et seq. *Putnam, Mathematical Theory of Finance,* pages 55 et seq.

conditions existing at the time of re-investment of the moneys. Such re-investment will be required whenever bonds now held in the fund mature and are collected, leaving available cash for re-investment. What market conditions may exist and what rate of return may be invested upon funds held in the trust are questions which are subject to all of the contingencies of any invested funds, but so far as the safety factor is concerned, the very fact that these Maricopa County Highway Bonds have been or will be called for redemption is in and of itself sufficient proof that the safety of the investment has been held intact. They are in fact safe, interest-bearing securities irrespective of whether Maricopa County elects to call and redeem them in accordance with the laws of the State of Arizona prior to their fixed maturity dates. On the other hand, whether the Maricopa County Bonds are subject to call and redemption prior to their fixed maturity dates, is solely a question of state law, and neither the validity, construction or effect of the federal statute—the Enabling Act—is involved in this determination. It is clear that the Federal Court cannot look merely to the Enabling Act to determine whether the Maricopa County Bonds are subject to call and redemption and whether, therefore, a breach of trust will exist if the bonds are in fact held to be subject to call and redemption.

On elementary principles it is submitted that the complaint in the court below fails to set forth any facts upon which federal jurisdiction can be based. It has always been the rule that to present such a case, it must appear from the allegations in the complaint that the outcome of the controversy depends

upon the construction of such federal law and that the controversy over such construction must be substantial.

The rule is well stated in *Western Union Telegraph Co. v. Ann Arbor R. Co.* (1899), 178 U.S. 239, 20 S. Ct. 867, 44 L. Ed. 1052, where it is said (L. Ed. 1054):

> "When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, *upon the determination of which the result depends, it is not a suit arising under the Constitution or laws.* And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States before jurisdiction can be maintained on this ground. * * *" (Italics supplied).

In *Spencer v. Duplan Silk Co.* (1903), 191 U.S. 526, 24 S. Ct. 174, 48 L. Ed. 287, it is said (L. Ed. 290):

> "In the present case it is contended that the jurisdiction was not dependent entirely on the opposite parties to the suit being citizens of different states, because the suit arose under the laws of the United States, and that, therefore, jurisdiction rested also on that ground. But a suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution, or validity or *construction* of the laws or treaties of the United States, upon the determina-

tion of which the result depends, and which appears in the record by plaintiff's pleading * * *." (Italics supplied).

Cuyahoga River Power Co. v. Northern Ohio T. and L. Co. (1919), 252 U.S. 388, 40 Sup. Ct. 404, 64 L. Ed. 626. In holding that no federal question was presented the Court said at p. 630:

> "The court, therefore, was considerate of the elements of the case and of plaintiff's rights, both against defendants as rival companies or as landowners; and necessarily, as we have said, if either or both of them be regarded as involved in the case, its or their assertion cannot be made in a Federal Court unless there be involved a Federal question. *And a Federal question not in mere form, but in substance, and not in mere assertion, but in essence and effect* * * *." (Italics supplied).

(d) *Federal jurisdiction is not created by the mere reservation of right to sue.*

Assuming that the Act of Congress granted to citizens of a state the right to enforce the provisions of this trust, this itself is insufficient to create a federal question within the jurisdiction of the Federal courts.

In *Shoshone Mining Co. v. Rutter* (1899), 177 U.S. 505, 20 S. Ct. 726, 44 L. Ed. 864, in holding that no federal question was presented simply by virtue of the fact that the suit was authorized by a federal law, the Court said at page 868:

> "So, we conclude, as we did in the prior case, that although these suits may sometimes so present questions arising under the Constitution or laws of the United States that the Federal courts will have jurisdiction, yet the mere fact that a suit is an adverse suit authorized by the

> statutes of Congress is not in and of itself sufficient to vest jurisdiction in the Federal courts * * *."

But section 28 of the Enabling Act did not grant jurisdiction in this court to permit plaintiff to assert the claim here made.

That section provides in part:

> "Nothing herein contained shall be taken as in limitation of the power of the state or of any citizen thereof to enforce the provisions of this act."

This clause by its tenor appears to assume the power of a citizen of the state to enforce the trust so set up, and then declares that such power is not intended to be limited. However, the statute can rise no higher than its source. In other words, plaintiff may show by the terms of this provision that his power to enforce this trust is not limited by the Enabling Act. But to come before this Court to exercise such alleged power, he must show that it has been granted him.

No other portion of this Act of Congress purports to grant him that right or power. The clause referred to must have been intended to mean that whenever there is a bona fide controversy as to whether the trust terms have been violated, the meaning of those terms is necessarily called into question; and there is then, and *only then,* a case arising under the laws of the United States, with jurisdiction granted to the federal district court. If this is not the import of this clause, then its insertion into the Enabling Act was but an idle act on the part of Congress.

The meaning or construction of the Act of Congress of June 20, 1910, Chap. 310, setting up the trust is in no manner called into question. By virtue of the fact that the ultimate source of the funds with which these outstanding bonds were purchased was property granted by the United States Government to the State of Arizona in trust, plaintiff seeks to invoke the jurisdiction of this court to ask it to grant a rehearing of final decisions of the Supreme Court of Arizona in a matter involving solely the construction of state laws.

This controversy may be finally determined without reference to the meaning of any Act of Congress and therefore no federal question is raised.

(e) *There is a total failure of Federal jurisdiction.*

Having shown that this suit cannot be maintained in the Federal Courts because (i) it is a suit against the sovereign State of Arizona which may not be sued without its consent, and (ii) it does not involve the validity, construction or effect of a federal statute, viz., the Enabling Act, we now pass to the other contentions advanced on this appeal "by way of passing" (Brief of Apellant, pages 15, 29, 48) to the effect that the decisions of the Arizona courts have impaired the obligations of Appellant's contracts.

This contention is utterly devoid of merit. Appellant is suing in the capacity of a citizen, resident and taxpayer of the State of Arizona against the sovereign State of Arizona. He does not claim to be a bondholder and the contract which is referred to as being impaired is that contained in the bonds issued by Maricopa County and now held by the

State of Arizona. Appellant is not a party to the contract and he claims no injury by virtue of any subsequent law of the State of Arizona, but only because he does not agree with the decisions of the courts of that State. These contentions may be summarily disposed of.

First: The obligation of a contract, within the meaning of Section 10 of Article I of the Constitution of the United States is not impaired by the decision of a state court.

> *Tidal Oil Co. v. Flanagan,* 263 U.S. 444, 68 L. ed. 382, 44 S. Ct. 197 (dispelling this "persistent error").

Second: Even if it were assumed that subsequent legislation existed in this case—which is not the fact[14]—it has long been the settled rule that the contracts of the state or its governmental agencies are not impaired as to such governments by any legislative action subsequent to the execution of a contract. The State is the keeper of its own contract rights and without injuring private rights under such contract, it may impair its own rights or the rights of a subordinate governmental agency whenever it sees fit.

> *Little River T. P. v. Board of Com'rs* (1902), 65 Kan. 9, 68 Pac. 1105.

In this case bonds were issued by the petitioner township. After their subscription the state passed a statute making them redeemable at the pleasure of the township after 10 years. The defendant county as holder claims that such statute impairs the obli-

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[14]See Brief for Appellees in State of Washington v. Maricopa County, C.C.A. 9th Cir., No. 10493, pp. 14-22.

gation of its contract, since at the time of issuance these bonds were not redeemable.

In holding no impairment resulted, it was said, to quote from the syllabus by the court:

> "2. A public corporation can acquire no vested contract rights as to the time of maturity or payment of bonds held by it against another public corporation. Public debts are matters of public concern, and as between debtor and creditor, both being public corporations, the legislature may, by proper enactment, compel the creditor corporation to accept payment even before maturity of the obligation held by it. *Such acts do not, as between public corporations, impair the obligation of contracts.*" (Emphasis ours).

As a matter of fact the relationship between a state and its political subdivisions or its public officers or agencies is not strictly a matter of contract. Such relationships may at any time be altered at the will of the State.

In *City of New Orleans v. New Orleans Water Works Co.,* (1891), 142 U.S. 79, 12 S. Ct. 142, 35 L. ed. 943, the city had a franchise with the company under which it received water without charge. A state statute subsequently passed required it to pay for the water, and it claimed that this constituted an impairment of its contract. In denying that a federal question was raised, the court said (35 L. ed. p. 947):

> " * * * In this case the city has no more right to claim an immunity for its contract with the Water Works Company, *than it would have had if such contract had been made directly with the State.* The State having authorized such contract, might revoke or modify it at its pleasure."

Third: Even if it were assumed that subsequent legislation was involved and would impair the contract obligation in so far as a subordinate agency of the state is concerned, the rule is nevertheless well settled that one not a party to the contract cannot raise the constitutional issue of impairment. Here Appellant is not even a bondholder. He is, and claims to be, only one member of the general public—a citizen, resident and taxpayer of the State of Arizona. [R. 2]

In *Williams v. Eggleston,* 170 U.S. 304, 42 L. ed. 1047, 18 S. Ct. 617, it is stated:

> "The first contention of plaintiff in error is that the contract of November 13, 1894, made between the state board and the Berlin Iron Bridge Company, was a valid contract, and that the two acts of May 24, 1895, and June 28, 1895, together with the orders and proceedings of the board of commissioners thereunder, are in violation of the 10th section of article I of the Federal Constitution, because they impair the obligation of that contract. A sufficient answer to this contention is, that the contract, if valid—and upon that we express no opinion—was between the state of Connecticut and the Berlin Iron Bridge Company, and that they have fully settled all differences in respect thereto. The parties to a contract are the ones to complain of a breach, and if they are satisfied with the disposition which has been made of it and of all claims under it, a third party has no right to insist that it has been broken." (42 L. ed. at page 1049).

(f) *No question of deprivation of property without due process of law is present.*

Equally without merit is the contention (R. 40) that the redemption of outstanding Maricopa County

Bonds will deprive "the trust fund" of property without due process of law.

The constitutional mandate reads as follows:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to *any person* within its jurisdiction the equal protection of the laws." (Italics supplied). (Amend. XIV, Sec. 1, U.S. Const.).

We know of no case where it has been contended, much less held, that a trust fund or any fund of money is a "person" within the constitutional inhibition. Furthermore, Appellant's alleged right to enforce the trust gives him no right to assert that he will be deprived of a constitutional right, especially when no breach of the trust is set forth.

Appellant has set forth no *facts* which show that he is to be deprived of property, and the rule must apply that one cannot raise the constitutional issue without showing some injury to himself.

In *Tyler v. Judges of the Court of Registration* (1900), 179 U.S. 405, 21 S. Ct. 206, 45 L. Ed. 252, wherein plaintiff did not set forth facts showing an injury to himself, the court held that he had an insufficient interest to raise the issue of denial of due process of law, saying at page 254:

> "In the assignment of error he complains only of the unconstitutionality of the statute, in that it deprives persons of property without due process of law * * *."
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> * * * * *
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> "* * * but to give him status in this court he is bound under his petition *to show, either that he has been, or is likely to be,* deprived of his prop-

erty without due process of law, in violation of the 14th Amendment; * * *." (Italics supplied).

Finally, it may be said that Appellant's reference to the cases of *Maricopa County v. Osborn* as "erroneous decisions" of the Supreme Court of Arizona is insufficient to raise a federal question. It is the universal rule that even though the decision of a state court may be erroneous, there is involved no denial of due process of law. (*Standard Oil Company v. Missouri,* 224 U.S. 270, 32 S. Ct. 406, 56 L. Ed. 760; *Patterson v. Colorado,* 205 U.S. 454, 27 S. Ct. 556, 51 L. Ed. 879).

In view of the foregoing and the fact that jurisdiction of this court is neither alleged nor shown on any other ground, it is respectfully submitted that no jurisdiction over this controversy exists in the Federal Court.

The obvious failure to establish federal jurisdiction bears out our contention that the sole purpose of this suit is to harrass and impede the officials of the sovereign State of Arizona in the performance of their public functions and the simulated charges herein made are sufficient to demonstrate the correctness of the Affirmative Fourth Defense stated in Appellees' Answer (R. 80).[15]

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[15]See, as to vexatious litigation generally, *Stewart v. Butler,* 27 Misc. 708, 709; 59 N.Y.S. 573, 574; *Cunha v. Anglo California National Bank,* 34 C.A. 2d. 383, 93 P. 2d 572.

ARGUMENT

I

THE FEDERAL COURTS ARE NOT PERMITTED TO EXERCISE THEIR INDEPENDENT JUDGMENT ON THE MERITS OF A CASE CONTRARY TO THE LAWS OF ARIZONA, AS DETERMINED BY THE JUDGMENTS OF THE COURTS OF THAT STATE WHICH ARE NOW RES JUDICATA AND PLEADED AS SUCH.

It is clear that what the Appellant is again attempting is to retry the decisions in the First and Second Maricopa Cases and in the Taxpayer's Suit. The answer to all of the contentions advanced by Appellant is clearly expressed in *Toole County Irrigation District v. Moody,* (C.C.A. 9, 1942), 125 F. 2d 498, cert. den. 316 U.S. 706, 62 S. Ct. 1281, 86 L. ed. 1762; rehearing den. 87 L. ed. 51, 63 S. Ct. 24. There the issue was whether under Montana statutes, bonds of an irrigation district were general obligations of the district or merely a charge on the land. The Montana Supreme Court, reversing a former decision, construed the statute to give the bonds the status of being merely a charge on the land. In reversing the District Court which declined to follow the State Supreme Court decision, the Circuit Court for the Ninth Circuit said:

> " * * * This was error; for, under the doctrine of Erie Railroad Co. v. Tompkins, 1938, 304 U.S. 64, 54 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487, the District Court was required—as we, too, are required—to follow State ex rel. Malott v. Board of County Commissioners, supra, and Rosebud Land & Improvement Co. v. Carter-

ville Irrigation District, supra, notwithstanding our decision in the Judith Basin case."

* * * * *

"Appellees argue that to give effect to the Montana decisions would violate the Constitution by impairing the obligation of a contract, namely, the district's obligation the existence of which is here in dispute. Appellees' argument assumes the existence of the obligation and thus begs the question, the question being whether or not the obligation exists. Whether it exists or not must be determined by the law of Montana as declared by the highest court of that State; * * *."

See, also:

Getz v. Town of Belleair (C.C.A. 5) 120F. 2d. 494.

It has always been the rule, even prior to the *Erie* case, that federal courts are bound to follow the decisions of the highest courts of the state upon questions relating to the construction of state statutes. In Vol. 25, C.J., pp. 832-833 (Sec. 171) this rule is stated as follows:

"The federal courts are bound to follow the decisions of the highest courts of the state upon questions relating to the construction of the state constitution and the validity thereunder of state statutes; and where a state statute has been construed by the highest judicial tribunal of a state, such construction is regarded as a part of the statute and is as binding upon the federal courts as the text of the statutes itself. * * * "

The case of *Marine Nat. Exch. Bank v. Kalt-Zimmers Mfg. Co.* (1943), 239 U.S. 357, 79 L. Ed. 427, 55 Sup. Ct. 226, considered a petition in a bankruptcy proceeding pending in Wisconsin for per-

mission to sell bonds that were pledged with petitioners by the bankrupt. The right to sell depended upon petitioners being holders in good faith. The bonds were received with knowledge that the pledgor was trustee under a deed of trust securing them, although the bonds themselves, payable to bearer, did not disclose this fact.

A Wisconsin statute provided that actual knowledge or knowledge of such facts as would amount to a taking in bad faith was required to prevent one from being a holder in due course. Subsequent to the transaction the Wisconsin Supreme Court declared that under the statute, knowledge on the part of the taker that the pledgor was a trustee under them did not constitute constructive notice or raise a duty to inquire as to whether the pledgor's title was subject to a trust because of abuse of his trust relation.

It appeared that this was against the majority ruling. The Circuit Court of Appeals said at 70 Fed. (2d) 818:

> "The federal courts are not bound by a decision of a state court in the interpretation or application of a provision of a uniform law contrary to the weight of authority as established by decisions of other states."

The argument was that the decision should not be followed because it was subsequent to the transaction.

The Supreme Court said, p. 432 of L. Ed.:

> "The Negotiable Instruments Law of Wisconsin was part of the law of that state when the bonds in controversy were pledged. This being so, the decision in Pollard v. Tobin sup-

plies the governing rule irrespective of the date when the decision was announced."

See, also:

Peters v. Broward, 222 U.S. 483, 56 L. Ed. 278, 32 Sup. Ct. 122;

Elmwood Township v. Marcy, 92 U.S. 289, 23 L. Ed. 710;

South Ottawa v. Perkins, 94 U.S. 260, 24 L. Ed. 154.

Even prior to the Erie Railroad Case and notwithstanding the general rule that the principles of construction of contracts were a matter of "general laws" as to which the state court decisions were not binding on the federal courts, it was nevertheless held that where a state court had construed a state statute which entered into and became a part of the contract, the federal court was bound by the construction of the statuory language. This was particularly true of cases involving the standard form fire insurance policies which were statutory contracts and the construction of the policy therefore involved the construction of the state statutes. The general rule was that the state court's construction of a statute which became a part of the policy was binding on the federal court and the policy was therefore to be determined as to its construction and effect by what the state court said the statute meant.

Mutual Life Insurance Co. v. Johnson, 293 U.S. 335, 79 L. ed. 398, 55 S. Ct. 154;

Kansas City Life Insurance Co. v. Adamson, 24 F. (2d) 712;

Ocean Accident & Guar. Corp. v. Torres, 91 F. (2d) 464 (cert. den. 302 U.S. 741, 82 L. ed. 573, 58 S. Ct. 143;

Clay v. Aetna Life Insurance Co., 53 F. (2d) 689;

Trapp v. Metropolitan Ins. Co., 72 F. (2d) 374;

Federal Life Ins. Co. v. Zebec, 82 F. (2d) 961;

Niagara Fire Ins. Co. v. Raleigh Hardware Co., 62 F (2d) 705;

New York Life Ins. Co. v. Truesdale, 79 F. (2d) 481;

Heine v. New York Life Ins. Co., 50 F. (2d) 382 (387);

Cook v. Illinois Bankers' Life Assn., 46 F. (2d) 782;

Great Southern Life Ins. Co. v. Burwell, 12 F. (2d) 244 (cert. den. 271 U.S. 683, 70 L. ed. 1150, 46 S. Ct. 633).

Similarly, where the contract was based upon local statutes, as, for example, an attachment bond or a supersedeas bond made according to state law, the obligation and liability are matters of local law and state decisions must be followed.

Fidelity & Dep. Co. v. L. Bucki & Son Lbr. Co., 189 U.S. 135, 47 L. ed. 744, 23 S. Ct. 582;

Pennsylvania v. Fidelity & Dep. Co., 180 Fed. 292;

Hartford Fire Ins. Co. v. Nance, 12 F. (2d) 575;

National Surety Co. v. Jean, 36 F. (2d) 468, 68 A.L.R 1326.

Finally, we submit that the authoritative decision of the Supreme Court of the United States in *Erie Railroad Co. v. Tompkins* (1938) 304 U.S. 64, 82

L. ed. 1188, 58 S. Ct. 817, is conclusive. In that case the court said:

> "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general', be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. * * *." (58 S. Ct. 822).

II

THE STATUTES OF ARIZONA IN EFFECT WHEN THE MARICOPA COUNTY BONDS WERE ISSUED SPECIFICALLY PROVIDED THAT THE BONDS WERE SUBJECT TO REDEMPTION WHENEVER BONDS ISSUED BY THE LOAN COMMISSIONERS COULD BE SOLD AT A LOWER INTEREST RATE AND THE PROCEEDS OF SALE APPLIED TO THE CALL AND REDEMPTION OF THE COUNTY BONDS.

What Appellant herein is attempting to do is simply to retry the decisions of the courts of Arizona. Admittedly the problem stated by Appellant is simply one of "What is the state law?" This problem has been conclusively answered by:

Maricopa County v. Osborn, 59 Ariz. 244, 125 P. 2d 703;

Maricopa County v. Osborn, ...Ariz....., 136 P. 2d 270;

J. L. Gust v. Boettcher and Company (the record of which is set forth as Appendix No. 1 to the Brief for Appellees in State of Washington v. Maricopa County, U.S. Circuit Court of Appeals for the Ninth Circuit No. 10493).

The argument advanced under paragraph II of the Brief for Appellant in this case is copied almost verbatim (even to the inclusion of the erroneous statement "plaintiff's bonds") from pages 97 to 116, inclusive, of the Brief for Appellants in State of Washington v. Maricopa County (U.S. Circuit Court of Appeals, Ninth Circuit, No. 10493) and accordingly for answer we refer to and incorporate herein by reference pages 42 to 68, inclusive, of Brief for Appellees filed in the same proceeding (No. 10493).

III

THE CALL AND REDEMPTION OF THE OUTSTANDING MARICOPA COUNTY HIGHWAY BONDS INVOLVES NO BREACH OF TRUST OF THE ENABLING ACT OF THE STATES OF NEW MEXICO AND ARIZONA.

We have pointed out, supra, (pages 2 to 35) that neither have the Federal Courts jurisdiction of this simulated cause of action, nor is there involved, in truth or in fact, any alleged breach of trust. The argument advanced by Appellant under this heading is based upon the theory that the State of Arizona by subsequent legislation is attempting to divert the proceeds of the lands donated by the Enabling Act to purposes other than authorized by the trust. We have shown that the contrary is the case. No subsequent statute of the State of Arizona is involved. The proceeds of the sale of lands donated to the State of

Arizona have been invested in strict accordance with the terms of the Enabling Act in "safe, interest-bearing securities." These securities are subject to call and redemption and will, upon the publication of notice of redemption, be paid in full. The argument that the State Treasurer of the State of Arizona has violated his trust by failing to institute action in the Federal Court is wholly without merit (supra, page 25). The argument that the Federal Court has authority to determine the propriety of the investment or reinvestment of moneys in the trust fund is utterly without merit.

Ervien v. United States, 251 U.S. 41, 64 L. ed. 128, 40 S. Ct. 75.

On the other hand, whether the State Treasurer of the State of Arizona is obligated to surrender bonds of Maricopa County held in the trust fund upon their call and redemption is a matter of state law, upon which the State Courts have already adjudicated the respective rights of the parties. We respectfully submit that neither in law nor in fact is there any foundation for the argument advanced by Appellant.

IV

ALL THE MATTERS AT ISSUE IN THIS CAUSE HAVE BEEN DECIDED BY THE SUPREME COURT OF ARIZONA IN THE FIRST AND SECOND MARICOPA CASES, AND BY THE SUPERIOR COURT OF MARICOPA COUNTY IN THE TAXPAYER'S SUIT, WHICH DECISIONS ARE RES JUDICATA, FINAL, BINDING AND CONCLUSIVE UPON THE RIGHTS OF APPELLANT AND ALL OTHERS.

It is sufficient under this heading to point out that Appellant sues as a citizen, resident and taxpayer of the State of Arizona (R 2-3). The identical suit was brought by his attorney, Mr. J. L. Gust, in the Taxpayer's Suit and every issue herein was conclusively adjudicated in the Taxpayer's Suit. Such is the rule in Arizona.

> *Luhrs v. City of Phoenix,* 33 Ariz. 156, 262 Pac. 1002.

We refer to and incorporate herein by reference pages 69 to 89, both inclusive, of the Brief for Appellees filed in this Court in *State of Washington v. Maricopa County* (No. 10493). When the plea of res judicata is sustained, state court decisions are binding even though a federal question be claimed.

> *Stone v. Bank of Kentucky,* 174 U.S. 408, 43 L. ed. 1187, 19 S. Ct. 881, affirming 88 Fed. 383.

CONCLUSION

We submit that the judgment of the court below should be affirmed.

Dated: Phoenix, Arizona,
December 1, 1943.

Respectfully submitted,

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EXHIBIT A

ARTICLE 10 OF THE CONSTITUTION OF THE STATE OF ARIZONA

(Vol. 1, Arizona Code Annotated, 1939, pps. 171 to 175, incl.)

§1. *(School lands held in trust.)*—All lands expressly transferred and confirmed to the state by the provisions of the Enabling Act approved June 20, 1910, including all lands granted to the state and all lands heretofore granted to the territory of Arizona, and all lands otherwise acquired by the state, shall be by the state accepted and held in trust to be disposed of in whole or in part, only in manner as in the said Enabling Act and in this constitution provided, and for the several objects specified in the respective granting and confirmatory provisions. The natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

§2. *(Lands to be used for objects designated.)*—Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than that for which such particular lands (or the lands from which such money or thing of value shall have been derived) were granted or confirmed, or in any manner contrary to the provisions of the said Enabling Act, shall be deemed a breach of trust.

§3. *(Disposition of lands.)*—No mortgage or other encumbrance of said lands, or any thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of the

transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of such lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place in the manner, and after the notice by publication thus provided for sales and leases of the lands themselves; Provided, that nothing herein contained shall prevent the leasing of said lands referred to in this article, for a term of five years or less, without said advertisement herein required.

§4. *(Appraisal of lands.)*—All lands, leaseholds, timber, and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor in any case less than the minimum price hereinafter fixed, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid.

§5. *(Minimum price for school lands.)*—No lands shall be sold for less than three dollars per acre, and no lands which are or shall be susceptible of irrigation under any projects now or hereafter completed or adopted by the United States under legislation for the reclamation of lands, or under any other project for the reclamation of lands, shall be sold at less than twenty-five dollars per acre; Provided, that the state, at the request of the secretary of the interior, shall from time to time relinquish such of its lands to the United States as at any time are needed for irrigation works in connection with any such government project, and other lands in lieu thereof shall be selected from lands of the character named and in

the manner prescribed in section twenty-four of the said Enabling Act.

§6. *(Hydroelectric sites.)*—No lands reserved and excepted of the lands granted to this state by the United States, actually or prospectively valuable for the development of water powers or power for hydroelectric use or transmission, which shall be ascertained and designated by the secretary of the interior within five years after the proclamation of the President declaring the admission of the state, shall be subject to any disposition whatsoever by the state or by any officer of the state, and any conveyance or transfer of such lands made within said five years shall be null and void.

§7. *(School funds.)*—A separate fund shall be established for each of the several objects for which the said grants are made and confirmed by the said Enabling Act to the state, and whenever any moneys shall be in any manner derived from any of said lands, the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such moneys was, by said Enabling Act, conveyed or confirmed. No moneys shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed. The state treasurer shall keep all such moneys invested in safe, interest-bearing securities, which securities shall be approved by the governor and secretary of state, and shall at all times be under a good and sufficient bond or bonds conditioned for the faithful performance of his duties in regard thereto.

§8. *(Sales contrary to constitution.)*—Every sale, lease, conveyance, or contract of or concerning any of the lands granted or confirmed, or the use thereof or the natural products thereof made to this state by the said Enabling Act, not made in substantial conformity with the provisions thereof, shall be null and void.

§9. *(Lands held under prior lease.)*—All lands expressly transferred and confirmed to the state, by the provisions of the Enabling Act approved June 20, 1910, including all lands granted to the state, and all lands heretofore granted to the territory of Arizona, and all lands otherwise acquired by the state, may be sold or leased by the state in the manner, and on the conditions, and with the limitations, prescribed by the said Enabling Act and this constitution, and as may be further prescribed by law; Provided, that the legislature shall provide for the separate appraisement of the lands and of the improvements on school and university lands which have been held under lease prior to the adoption of this constitution, and for reimbursement to the actual bona fide residents or lessees of such land upon which such improvements are situated, as prescribed by title 65, Civil Code of Arizona, 1901, and in such cases only as permit reimbursements to lessees in said title 65.

§10. *(Protection of residents on state lands.)*—The legislature shall provide by proper laws for the sale of all state lands or the lease of such lands, and shall further provide by said laws for the protection of the actual bona fide residents and lessees of said lands, whereby such residents and lessees of said lands shall be protected in their rights to their improvements (including water rights) in such manner that in case of lease to other parties the former lessee shall be paid by the succeeding lessee the value of such improvements and rights and actual bona fide residents and lessees shall have preference to a renewal of their leases at a reassessed rental to be fixed as provided by law.

§11. *(Maximum amount of land purchases.)*—No individual, corporation or association shall be allowed to purchase more than one hundred sixty (160) acres of agricultural land or more than six hundred forty (640) acres of grazing land.

EXHIBIT B

ACT OF CONGRESS OF JUNE 20TH, 1910, COMMONLY DESIGNATED AS THE "ENABLING ACT" PROVIDING FOR THE ADMISSION OF THE TERRITORY OF ARIZONA INTO THE UNION OF STATES.

(Vol. 1, Arizona Code Annotated, 1939, pps. 37 to 51, incl.)

ENABLING ACT

(Sections 1 to 18 inclusive refer to New Mexico)

§19. That the qualified electors of the territory of Arizona are hereby authorized to vote for and choose delegates to form a constitutional convention for said territory for the purpose of framing a constitution for the proposed state of Arizona. Said convention shall consist of fifty-two delegates; and the governor, chief justice, and secretary of said territory shall apportion the delegates to be thus selected, as nearly as may be, equitably among the several counties thereof in accordance with the voting population as shown by the vote cast at the election for delegate in congress in said territory in nineteen hundred and eight.

A qualified elector within the meaning of this section shall be any male citizen of the United States of the age of twenty-one years who shall have resided in the territory at least twelve months next preceding the date fixed for the election of delegates to the constitutional convention, as herein provided for, and who shall possess in other respects the qualifications of an elector as provided by title twenty, Revised Statutes of Arizona, August second, nineteen hundred and one. Within ten days after the issuance of the governor's proclamation ordering the election of delegates to the constitutional convention, as herein provided, the board of supervisors of each county of the territory shall meet and authorize and require a reregistration of the qualified electors of said

county; provided, however, that there need not be re-registration of the qualified electors whose names appear on the great register of said county for the year nineteen hundred and eight, but all such names, together with such as may be registered under the provisions of this section, shall constitute the great register of said county and be used at each of the elections herein provided for; and so far as the same is consistent with the provisions of this act, such registration, as also the making up, printing, distribution, and use of such great register, shall in all respects conform to and be governed by the provisions of chapter three of said title twenty, Revised Statutes of Arizona, nineteen hundred and one. And the provisions of this section shall apply to all voters at all elections for the election of delegates to the constitutional convention and for the ratification of the constitution, for state officers, members of the state legislature, representatives in congress, and all other officers named in said constitution or in any manner herein provided for or mentioned.

The governor of said territory shall, within thirty days after the approval of this act, by proclamation, in which the aforesaid apportionment of delegates to the convention shall be fully specified and announced, order an election of the delegates aforesaid on a day, designated by him in said proclamation, not earlier than sixty nor later than ninety days after the approval of this act. Such election for delegates shall be held and conducted, the returns made, and the certificates of persons elected to such convention issued, as nearly as may be, in the same manner as is prescribed by the laws of said territory regulating elections therein of members of the legislature existing at the time of the last election of said members of the legislature; and the provisions of said laws in all respects, including the qualifications of electors and registration, are hereby made applicable to the election herein provided for; and said convention when so called to order and organized shall be the sole judge of the election and qualifications of its

own members. Qualifications to entitle persons to vote on the ratification or rejection of the constitution formed by said convention when said constitution shall be submitted to the people of said territory hereunder shall be the same as the qualifications to entitle persons to vote for delegates to said convention.

§20. That the delegates to the convention thus elected shall meet in the hall of the house of representatives in the capitol of the territory of Arizona at twelve o'clock noon on the fourth Monday after their election, and they shall receive compensation for the period they actually are in session, but not for more than sixty days in all; after organization they shall declare on behalf of the people of said proposed state that they adopt the Constitution of the United States, whereupon the said convention shall be, and is hereby, authorized to form a constitution and provide for a state government for said proposed state, all in the manner and under the conditions contained in this act. The constitution shall be republican in form and make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence.

And said convention shall provide, by an ordinance irrevocable without the consent of the United States and the people of said state—

First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said state shall ever be molested in person or property on account of his or her mode of religious worship; and that polygamous or plural marriages, or polygamous cohabitation, and the sale, barter, or giving of intoxicating liquors to Indians, and the introduction of liquors into Indian country are forever prohibited.

Second. That the people inhabiting said proposed state do agree and declare that they forever

disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the congress of the United States; that the lands and other property belonging to citizens of the United States residing without the said state shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by the state upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein, or in the ordinance herein provided for, shall preclude the said state from taxing as other lands and other property are taxed any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any act of congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said state so long and to such extent as congress has prescribed or many hereafter prescribe.

Third. That the debts and liabilities of said territory of Arizona, and the debts of the counties thereof, which shall be valid and subsisting at the time of the passage of this act, shall be assumed and paid by said proposed state, and that said state shall, as to all such debts and liabilities, be subrogated to all the rights, including rights of indemnity and reimbursement, existing in favor of said territory or of any of the several counties thereof at the time of the passage of this act; provided, that nothing in this act shall be construed as

validating or in any manner legalizing any territorial, county, municipal, or other bonds, obligations, or evidences of indebtedness of said territory or the counties or municipalities thereof which now are or may be invalid or illegal at the time said proposed state is admitted, nor shall the legislature of said proposed state pass any law in any manner validating or legalizing the same.

Fourth. That provisions shall be made for the establishment and maintenance of a system of public schools which shall be open to all the children of said state and free from sectarian control; and that said schools shall always be conducted in English.

Fifth. That said state shall never enact any law restricting or abridging the right of suffrage on account of race, color, or previous condition of servitude, and that ability to read, write, speak, and understand the English language sufficiently well to conduct the duties of the office without the aid of an interpreter shall be a necessary qualification for all state officers and members of the state legislature.

Sixth. That the capital of said state shall, until changed by the electors voting at an election provided for by the legislature of said state for that purpose, be at the city of Phoenix, but no election shall be called or provided for prior to the thirty-first day of December, nineteen hundred and twenty-five.

Seventh. That there be and are reserved to the United States, with full acquiescence of the state, all rights and powers for the carrying out of the provisions by the United States of the act of congress entitled "An act appropriating the receipts from the sale and disposal of public lands in certain states and territories to the construction of irrigation works for the reclamation of arid lands," approved June seventeenth, nineteen hundred and two, and acts amendatory thereof or supplementary thereto, to the same extent as if said state had remained a territory.

Eighth. That whenever hereafter any of the lands contained within Indian reservations or allotments in said proposed state shall be allotted, sold, reserved, or otherwise disposed of, they shall be subject, for a period of twenty-five years after such allotment, sale, reservation, or other disposal, to all the laws of the United States prohibiting the introduction of liquor into the Indian country.

Ninth. That the state and its people consent to all and singular the provisions of this act concerning the lands hereby granted or confirmed to the state, the terms and conditions upon which said grants and confirmations are made, and the means and manner of enforcing such terms and conditions, all in every respect and particular as in this act provided.

All of which ordinance described in this section shall, by proper reference, be made a part of any constitution that shall be formed hereunder, in such terms as shall positively preclude the making of any future constitutional amendment of any change or abrogation of the said ordinance in whole or in part without the consent of congress.

§21. That when said constitution shall be formed, as aforesaid, the convention forming the same shall provide for the submission of said constitution to the people of Arizona for ratification at an election which shall be held on a day named by said convention not earlier than sixty nor later than ninety days after said convention adjourns, at which election the qualified voters of Arizona shall vote directly for or against said constitution and for or against any provisions thereof separately submitted. The returns of said election shall be made by the election officers direct to the secretary of the territory of Arizona at Phoenix, who, with the governor and chief justice of said territory, shall constitute a canvassing board, and they or any two of them, shall meet at said city of Phoenix on the third Monday after said election and shall canvass the same. If a

majority of the legal votes cast at said election shall reject the constitution, the said canvassing board shall forthwith certify said result to the governor of said territory together with the statement of votes cast upon the question of the ratification or rejection of said constitution and also a statement of the votes cast for or against such provisions thereof as were separately submitted to the voters at said election; whereupon the governor of said teritory shall, by proclamation, order the constitutional convention to reassemble at a date not later than twenty days after the receipt by said governor of the documents showing the rejection of the constitution by the people, and thereafter a new constitution shall be framed and the same proceedings shall be taken in regard thereto in like manner as if said constitution were being originally prepared for submission and submitted to the people.

§22. That when said constitution and such provisions thereof as have been separately submitted shall have been duly ratified by the people of Arizona, as aforesaid, a certified copy of the same shall be submitted to the President of the United States and to congress for approval, together with the statement of the votes cast thereon and upon any provisions thereof which were separately submitted to and voted upon by the people. And if congress and the President approve said constitution and the said separate provisions thereof, if any, or if the President approves the same and congress fails to disapprove the same during the next regular session thereof, then and in that event the President shall certify said facts to the governor of Arizona, who shall, within thirty days after the receipt of said notification from the President of the United States, issue his proclamation for the election of the state and county officers, the members of the state legislature, and representative in congress, and all other officers provided for in said constitution, all as hereinafter provided; said election to take place not earlier than sixty days nor later than ninety days

after said proclamation by the governor of Arizona ordering the same.

§23. That said constitutional convention shall, by ordinance, provide that in case of the ratification of said constitution by the people, and in case the President of the United States and congress approve the same, or in case the President approve the same and congress fails to act in its next regular session, all as hereinbefore provided, an election shall be held at the time named in the proclamation of the governor of Arizona, provided for in the preceding section, at which election of officers for a full state government, including a governor, members of the legislature, one representative in congress, and such other officers as such constitutional convention shall prescribe, shall be chosen by the people. Such election shall be held, the returns thereof made, canvassed, and certified to by the secretary of the territory, in the same manner as in this act prescribed for the making of the returns, the canvassing and certification of the same of the election for the ratification or rejection of said constitution, as hereinbefore provided, and the qualifications of the voters at said election for all state officers, members of the legislature, county officers, and representative in congress, and other officers prescribed by said constitution shall be made the same as the qualifications of voters at the election for the ratification or rejection of said constitution, as hereinbefore provided. When said election of state and county officers, members of the legislature, and representative in congress, and other officers above provided for shall be held and the returns thereof made, canvassed, and certified, as hereinbefore provided, the governor of the territory of Arizona shall certify the result of said election as canvassed and certified, as herein provided to the President of the United States, who thereupon shall immediately issue his proclamation announcing the result of said election so ascertained, and upon the issuance of said proclamation by the President of the United States the proposed state of

Arizona shall be deemed admitted by congress into the Union by virtue of this act on an equal footing with other states. Until the issuance of said proclamation by the President of the United States, and until the said state is so admitted into the Union and said officers are elected and qualified under the provisions of the constitution, the county and territorial officers of said territory, including the delegate in congress thereof elected in the general election in nineteen hundred and eight, shall continue to discharge the duties of their respective offices in and for said territory; provided, that no session of the territorial legislative assembly shall be held in nineteen hundred and eleven.

§24. That in addition to sections sixteen and thirty-six heretofore reserved for the territory of Arizona, sections two and thirty-two in every township in said proposed state not otherwise appropriated at the date of the passage of this act are hereby granted to the said state for the support of common schools; and where sections two, sixteen, thirty-two, and thirty-six, or any part thereof, are mineral, or have been sold, reserved, or otherwise appropriated or reserved by or under the authority of any act of congress, or are wanting or fractional in quantity, or where settlement thereon with a view to preemption or homestead, or improvement thereof with a view to desert-land entry has been made heretofore or hereafter, and before the survey thereof in the field, the provisions of sections twenty-two hundred and seventy-five and twenty-two hundred and seventy-six of the Revised Statutes, and acts amendatory thereof or supplementary thereto, are hereby made applicable thereto and to the selection of lands in lieu thereof to the same extent as if sections two and thirty-two, as well as sections sixteen and thirty-six, were mentioned therein: Provided, however, that the area of such indemnity selections on account of any fractional township shall not in any event exceed an area which, when added to the area of the above-named sections returned by

the survey as in place, will equal four sections for fractional townships containing seventeen thousand two hundred and eighty acres or more, three sections for such townships containing eleven thousand five hundred and twenty acres or more, two sections for such townships containing five thousand seven hundred and sixty acres or more, nor one section for such townships containing six hundred and forty acres or more; and provided, further, that the grants of sections two, sixteen, thirty-two, and thirty-six to said state, within nationl forests now existing or proclaimed, shall not vest the title to said sections in said state until the part of said national forests embracing any of said sections is restored to the public domain; but said granted sections shall be administered as a part of said forests, and at the close of each fiscal year there shall be paid by the secretary of the treasury to the state, as income for its common school fund, such proportion of the gross proceeds of all the national forests within said state as the area of lands hereby granted to said state for school purposes which are situated within said forest reserves, whether surveyed or unsurveyed, and for which no indemnity has been selected, may bear to the total area of said sections when unsurveyed to be determined by the secretary of the interior, by protraction or otherwise, the amount necessary for such payments being appropriated and made available annually from any money in the treasury not otherwise appropriated.

§25. That in lieu of the grant of land for purposes of internal improvements made to new states by the eighth section of the Act of September fourth, eighteen hundred and forty-one, and in lieu of the swamp land grant made by the Act of September twenty-eight, eighteen hundred and fifty, and section twenty-four hundred and seventy-nine of the Revised Statutes, and in lieu of the grant of thirty thousand acres for each senator and representative in congress, made by the Act of July second, eighteen hundred and three, which grants are here-

by declared not to extend to the said state, the following grants are hereby made, to-wit:

For university purposes, two hundred thousand acres; for legislative, executive, and judicial public buildings heretofore erected in said territory or to be hereafter erected in the proposed state, and for the payment of the bonds heretofore or hereafter issued therefor, one hundred thousand acres; for penitentiaries, one hundred thousand acres; for insane asylums, one hundred thousand acres; for school and asylums for the deaf, dumb, and blind, one hundred thousand acres; for miners' hospitals for disabled miners, fifty thousand acres; for normal schools, two hundred thousand acres; for state charitable, penal, and reformatory institutions, one hundred thousand acres; for agricultural and mechanical colleges, one hundred and fifty thousand acres; and the national appropriation heretofore annually paid for the agricultural and mechanical college to said territory shall until further order of congress, continue to be paid to said state for the use of said institution; for school of mines, one hundred and fifty thousand acres; for military institutes, one hundred thousand acres; and for the payment of the bonds and accrued interest thereon issued by Maricopa, Pima, Yavapai, and Coconino Counties, Arizona, which said bonds were validated, approved, and confirmed by the act of congress of June sixth, eighteen hundred and ninety-six (twenty-ninth statutes, page two hundred and sixty-two) one million acres; provided, that if there shall remain any of the one million acres of land so granted, or of the proceeds of the sale or lease thereof, or rents, issues, or other profits therefrom, after the payment of said debts, such remainder of lands and the proceeds of sales thereof shall be added to and become a part of the permanent school fund of said state, the income therefrom only to be used for the maintenance of the common schools of said state.

§26. That the schools, colleges, and universities provided for in this act shall forever remain under

the executive control of the said state, and no part of the proceeds arising from the sale or disposal of any lands granted herein for educational purposes shall be used for the support of any sectarian or denominational school, college, or university.

§27. That five per cent of the proceeds of sales of public lands lying within said state which shall be sold by the United States subsequent to the admission of said state into the Union, after deducting all the expenses incident to such sales, shall be paid to the said state, to be used as a permanent inviolable fund, the interest of which only shall be expended for the support of the common schools within said state.

§28. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to said territory, are hereby expressly transferred and confirmed to the said state, shall be by the said state held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

No mortgage or other encumbrance of the said lands, or any part thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be

affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of the transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in the newspaper of the circulation which shall then be regularly published nearest to the location of such lands so offered; nor shall any sale or contract for the sale of any timber or other natural products of such lands be made save at the place, in the manner, and after the notice by publication thus provided for sales and leases of the lands themselves; provided, that nothing herein contained shall prevent said proposed state from leasing any of said lands referred to in this section for a term of five years or less without said advertisement herein required.

All lands, leaseholds, timber and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor, in any case less than the minimum price hereinafter fixed, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid.

No lands shall be sold for less than three dollars per acre, and no lands which are or shall be susceptible of irrigation under any projects now or hereafter completed or adopted by the United States under legislation for the reclamation of lands, or under any other project for the reclamation of lands, shall be sold at less than twenty-five dollars per acre: Provided, that said state, at the request of the secretary of the interior, shall from time to time relinquish such of its lands to the United States as at any time are needed for irrigation works in connection with any such government project. And

other lands in lieu thereof are hereby granted to said state, to be selected from lands of the character named and in the manner prescribed in section twenty-four of this act.

There is hereby reserved to the United States and excepted from the operation of any and all grants made or confirmed by this act to said proposed state all land actually or prospectively valuable for the development of water power or power for hydro-electric use or transmission and which shall be ascertained and designated by the secretary of the interior within five years after the proclamation of the President declaring the admission of the state; and no land so reserved and excepted shall be subject to any disposition whatsoever of said state, and any conveyance or transfer of such land by said state or any officer thereof shall be absolutely null and void within the period above named; and in lieu of the land so reserved to the United States and excepted from the operation of any of said grants there be, and is hereby, granted to the proposed state an equal quantity of land to be selected from land of the character named and in the manner prescribed in section twenty-four of this act.

A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such moneys was by this act conveyed or confirmed. No money shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed. The state treasurer shall keep all such moneys invested in safe, interest-bearing securities, which securities shall be approved by the governor and secretary of state of said proposed state, and shall at all times be under a good and sufficient bond

or bonds conditioned for the faithful performance of his duties in regard thereto, as defined by this act and the laws of the state not in conflict herewith.

Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this act shall be null and void, any provisions of the constitution or laws of the said state to the contrary notwithstanding. It shall be the duty of the attorney-general of the United States to prosecute, in the name of the United States and in its courts, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.

Nothing herein contained shall be taken as in limitation of the power of the state or of any citizen thereof to enforce the provisions of this act.

§29. That all lands granted in quantity, or as indemnity, by this act, shall be selected, under the direction and subject to the approval of the secretary of the interior, from the surveyed, unreserved, unappropriated, and nonmineral public lands of the United States within the limits of said state, by a commission composed of the governor, surveyor general or other officer exercising the functions of a surveyor-general, and the attorney-general of the said state, and after its admission into the Union said state may procure public lands of the United States within its boundaries to be surveyed with a view to satisfying any public land grants made to said state in the same manner prescribed for the procurement of such surveys by Washington, Idaho, and other states by the act of congress approved August eighteen, eighteen hundred and ninety-four (twenty-eight Statutes at Large, page three hundred and ninety-four) and the

provisions of said act, in so far as they relate to such surveys and the preference right of selection, are hereby extended to the said state of Arizona. The fees to be paid to the register and receiver for each final location or selection of one hundred and sixty acres made hereunder shall be one dollar.

§30. That all grants of lands heretofore made by any act of congress to said territory, except to the extent modified or repealed by this act, are hereby ratified and confirmed to said state, subject to the provisions of this act, provided, however, that nothing in this act contained shall, directly, or indirectly, affect any litigation now pending and to which the United States is a party, or any right or claim therein asserted.

§31. That the said state, when admitted as aforesaid, shall constitute one judicial district, and the circuit and district courts of said district shall be held at the capital of said state, and the said district shall, for judicial purposes, be attached to the ninth judicial circuit. There shall be appointed for said district one district judge, one United States attorney, one United States marshal. The judge of said district shall receive a yearly salary the same as other similar judges of the United States payable as provided by law, and shall reside in the district to which he is appointed. There shall be appointed clerks of said courts, who shall keep their offices at the capital of said state. The regular terms of said courts shall be held on the first Monday in April and the first Monday in October of each year. The circuit and district courts for said district, and the judges thereof, respectively, shall possess the same powers and jurisdiction and perform the same duties required to be performed by the other circuit and district courts and judges of the United States, and shall be governed by the same laws and regulations. The marshal, district attorney, and the clerks of the circuit and district courts of said district, and all other officers and persons performing duties

in the administration of justice therein, shall severally possess the powers and perform the duties lawfully possessed and required to be performed by similar officers in other districts of the United States, and shall, for the services they perform, receive the fees and compensation now allowed by law to officers performing similar services for the United States in the territory of Arizona.

§32. That all cases of appeal or writ of error and all other proceedings heretofore lawfully prosecuted and now pending in the Supreme Court of the United States or in the proper circuit court of appeals upon any record from the Supreme Court of said territory, and all cases of appeal or writ of error and all other proceedings heretofore lawfully prosecuted and now pending in the Supreme Court of the United States upon any record from a district court of said territory, or, in any matter of habeas corpus, upon any return or order of a district judge thereof, and all and singular the cases aforesaid which, hereafter shall be so lawfully prosecuted and remain pending in the Supreme Court of the United States or in the proper circuit court of appeals, may be heard and determined by the Supreme Court of the United States or the proper circuit court of appeals, as the case may be. And the mandate of execution or of further proceedings shall be directed by the Supreme Court of the United States or the circuit court of appeals to the circuit or district court hereby established within the said state, or to the Supreme Court of such state, as the nature of the case may require. And the circuit, district, and state courts herein named shall, respectively, be the successors of the Supreme Court and of the district courts of said territory as to all such cases arising within the limits embraced within the jurisdiction of said courts, respectively, with full power to proceed with the same and award mesne or final process therein; and that from all judgments and decrees or other determinations of any court of the said territory, in any case begun prior to admission, the parties to

such cause shall have the same right to prosecute appeals, writs of error, and petitions for review to the Supreme Court of the United States or to the circuit court of appeals as they would have had by law prior to the admission of said state into the Union.

§33. That the said circuit or the said district courts, as the case may be, shall have jurisdiction to hear and determine all trials, proceedings, and questions arising, or which may be raised, in any case or controversy pending in any of the courts other than the Supreme Court of the said territory at the date of its admission as a state, the case being such that, under the laws of the United States touching the jurisdiction of federal courts, it might properly have been begun in or (as a separate controversy or otherwise) removed to said circuit or said district court had they been established when the litigation of such case or controversy was commenced. Should such case or controversy be such that, if begun within a state, it would have fallen within the exclusive original cognizance of a circuit or district court of the United States sitting therein, it shall be transferred to the one or the other of said courts sitting within said state of Arizona, with due regard for the general provisions of law defining their respective jurisdictions; but should such case or controversy be by nature one of those which under such general jurisdictional provisions fall within the concurrent, but not the exclusive, jurisdiction of such courts, then such transfer may be had upon application of any party to such case or controversy, to be made as nearly as may be in the manner now provided for removal of cases from state to federal courts, and not later than sixty days after the lodgement of the record of such case or controversy in the proper court of the state as herein provided. All cases and controversies pending at the admission of the state, and not transferable to the said circuit or district court under the foregoing provisions, shall be heard and determined by the proper court of the state.

All files, records and proceedings relating to any such pending cases or controversies shall be transferred to such circuit, district and state courts, respectively, in such wise and so authenticated or proven as such courts shall respectively by rule direct, and upon transfer of any case or controversy as herein provided the same shall be proceeded with in due course of law; and no writ, action, indictment, information, cause or proceeding pending in any court of the said territory at the time of its admission as a state shall abate or be deemed ineffective by reason of such admission, but the same shall be transferred and proceeded with in the proper circuit or district court of the United States or state court, as the case may be, provided, however, that all cases pending and undisposed of in the Supreme Court of the said territory at the time of the admission thereof as a state shall be transferred, together with the records thereof, to the highest appellate court of the state, and shall be heard and determined thereby, and appeal to and writ of error from the Supreme Court of the United States shall lie to review all such cases in accordance with the rules and principles applicable to the review by that tribunal of cases determined by state courts; provided, further, that all cases so pending in said territorial Supreme Court in which the United States is a party or which, if instituted within a state, would have fallen within the exclusive original cognizance of a circuit or district court of the United States, shall, with the records appertaining thereto, be transferred to the circuit court of appeals for the ninth circuit, and be there heard and decided; and any such case which, if finally decided by the Supreme Court of the territory, would have been in any manner reviewable by the Supreme Court of the United States may, in like manner and with like effect, be so reviewed after final decision thereof by said circuit court of appeals. Transfers of all files and records from the said territorial Supreme Court to the highest appellate court of the state and to the said circuit court of appeals shall be accomplished in

such manner and under such proofs and authentications as the two last-mentioned courts shall respectively by rule prescribe.

All civil causes of action and all criminal offenses which shall have arisen or been committed prior to the admission of said territory as a state, but as to which no suit, action, or prosecution shall be pending at the date of such admission, shall be subject to prosecution in the courts of said state and the said circuit or district courts of the United States sitting therein, and to review in the appellate courts of such respective sovereignties in like manner and to the same extent as if said state had been created and such circuit, district, and state courts had been established prior to the accrual of such causes of action and the commission of such offenses; and in effectuation of this provision such of the said criminal offenses as shall have been committed against the laws of the said territory shall be tried and punished by the appropriate courts of the said state, and such as shall have been committed against the laws of the United States shall be tried and punished in the circuit or district courts of the United States.

All suits and actions brought by the United States in which said territory is named as a party defendant which shall be pending in any court of said territory at the date of its admission hereunto shall be transferred as herein provided, and the said state shall be substituted therein and become a party defendant thereto in lieu of said territory.

§34. That the members of the legislature elected at the election hereinbefore provided for may assemble at Phoenix, organize and elect two senators of the United States, in the manner now prescribed by the constitution and laws of the United States; and the governor and secretary of state of the proposed state shall certify the election of the senators and representatives in the manner required by law, and the senators and representatives so elected shall be entitled to be admitted to seats in congress and to all

rights and privileges of senators and representatives of other states in the congress of the United States; and the officers of the state government formed in pursuance of said constitution, as provided by the constitutional convention, shall proceed to exercise all the functions of state officers; and all laws of said territory in force at the time of its admission into the Union shall be in force in said state until changed by the legislature of said state, except as modified or changed by this act or by the constitution of the state; and the laws of the United States shall have the same force and effect within the said state as elsewhere within the United States.

§35. That the sum of one hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the treasury not otherwise appropriated, for defraying all and every kind and character of expense incident to the elections and conventions provided for in this act: that is, the payment of the expenses of holding the election for members of the constitutional convention and the election for the ratification of the constitution, at the same rates that are paid for similar services under the territorial laws, and for the payment of the mileage for and salaries of members of the constitutional convention, at the same rates that are paid to members of the said territorial legislature under national law, and for the payment of all proper and necessary expenses, officers, clerks, and messengers thereof, and printing and other expenses incident thereto; provided, that any expense incurred in excess of said sum of one hundred thousand dollars shall be paid by said state. The said money shall be expended under the direction of the secretary of the interior, and shall be forwarded to be locally expended in the present territory of Arizona, through the secretary of said territory, as may be necessary and proper in the discretion of the secretary of the interior, in order to carry out the full intent and meaning of this act.

Approved June 20th, 1910.